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Supreme Court of the United States

OCTOBER TERM, 1949

NO.....

STATE OF WASHINGTON EX REL. THE WASHINGTON WATER POWER COMPANY, a corporation, CITY FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, and CHELAN JOINT SCHOOL DISTRICT NO. 129, a municipal corporation, and TOWN OF CHELAN, a municipal corporation,
Appellants,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR CHELAN COUNTY, HONORABLE FRED KEMP, JUDGE,
Appellee.

Appeal from the Supreme Court of the State of Washington.

APPELLANTS' BRIEF ON APPELLEE'S MOTION TO DISMISS APPEAL

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Appellee has interposed a motion to dismiss the appeal as part of its statement made against the jurisdiction of this Court. The motion is based upon two grounds: first, that the judgment of the Supreme Court of the State of Washington is not a final judgment which is appealable to this Court; and second, that no substantial federal question is involved. We believe the facts are set out fully in appellants' jurisdictional statement and appellee's counter-statement, and we will, therefore, confine ourselves to a discussion of the law in this brief.

1. THE JUDGMENT IS A FINAL JUDGMENT AND THEREFORE APPEALABLE

The question simply stated is: Is a judgment of the Supreme Court of Washington affirming a decree of public use and necessity in a condemnation proceeding a "final judgment" within the meaning of Title 28 United States Code, Section 1257(2)? Appellee, in its statement, relies on *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U. S. 251; 61 L. Ed. 702; 37 Sup. Ct. 295. This case was decided in March, 1917, and did hold that such a judgment as involved here was not final and therefore not appealable. The case was decided, we believe, on a misapprehension of the law of the State of Washington as determined by its Supreme Court. The subsequent history of the case bears out our conten-

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tion. After the United States Supreme Court refused to entertain the appeal, the matter of the amount of the award was tried out in the Superior Court for the State of Washington. An award of $2,500.00 was given by the jury. If the property could legally be taken, this was a satisfactory award and no error had been committed in the introduction of evidence or the instructions to the jury. The condemnee tried in two actions to get the matter again before the Supreme Court. In *Coats-Fordney Logging Co. v. Grays Harbor Logging Co.*, 100 Wash. 491; 171 Pac. 241, it appealed from the judgment fixing the amount of the award. The Supreme Court, however, said:

> "The only error assigned is that the Statute upon which the proceeding is based is in violation of the fourteenth amendment to the Federal constitution. That question was determined adversely to the contention of the appellants in *State ex rel. Grays Harbor Logging Co. v. Superior Court*, 82 Wash. 503, 144 Pac. 722. No new argument is presented upon this appeal. This court has uniformly held that an appeal from an award of damages in a condemnation case presents to this court for consideration only the propriety and justice of the award. *State ex rel. McCormick v. Superior Court*, 43 Wash. 97, 86 Pac. 205; *State ex rel. Pagett v. Superior Court*, 46 Wash. 35, 89 Pac. 178; *Whatcom County v. Yellowkanim*, 48 Wash. 90, 92 Pac. 892; *Calispel Diking District v. McLeish*, 63 Wash. 331, 115 Pac. 508.
>
> "No claim is made upon this appeal that the

damages awarded were not sufficient, or that the trial court committed error upon the trial of that question. There is, therefore, nothing for us to consider, unless we review our decision in *State ex rel. Grays Harbor Logging Co. v. Superior Court,* supra. Since the question there considered cannot be raised upon this appeal, it follows that the judgment must be affirmed."

In this decision the Supreme Court of Washington did not pass on any federal question and there was nothing upon which an appeal to this Court could be based. Likewise the judgment was not final in the sense that the litigation was finally terminated, as a decree of appropriation had not yet been entered. This, however, was later done and the condemnee again sought relief in the Supreme Court of Washington.

State ex rel. Grays Harbor Logging Co. v. Sup'r. Ct., 100 Wash. 485, 171 Pac. 238.

However, under the laws of Washington, a decree of appropriation is not appealable and an application for a writ of review and stay of proceedings was sought. The Court recited the history of the litigation up to the hearing in the Supreme Court of the United States and said:

"Thereafter, upon July 2, 1917, the cause having been remitted to the superior court of Grays

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Harbor county, a trial was had before the court and jury upon the question of the damages to be awarded and paid the respondent, the relators here, for the taking and damaging of their lands as described in the petition for condemnation. The jury awarded damages, and judgment was entered thereon in favor of relators in the sum of $2,500 as the value of the lands taken and damages to the remainder. On August 21, 1917, the court made and entered its decree of appropriation in the cause. The relators here have appealed from the judgment of award of the lower court, and have also brought this proceeding for a writ of review, frankly stating that they are seeking, and believe they are entitled to, a review of all three of the judgments heretofore entered in the cause, in order to obtain a final determination so that they can have the question of the constitutionality of the private way of necessity act passed upon by the supreme court of the United States upon a final judgment.

"The act under which the condemnation proceeding was instituted provides that the procedure shall be the same as that provided for the condemnation of private property by railroad companies. Rem. Code, Sec. 5857-2. The method of procedure in condemnation actions by railroad companies is found in Rem. Code, Sec. 921 *et seq.* In considering the provisions of the last act, this court, in the case of *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser,* 82 Wash. 467, 144 Pac. 706, said:

'The statute referred to seemingly contemplates

the entry, during the course of the proceedings, of three separate and distinct judgments; first (by Rem. & Bal. Code, Sec. 925, P. C. 171, Sec. 176), a judgment finding that the contemplated use for which the property is sought to be appropriated is really a public use, and the necessity for its taking for that use; second (by Id. Sec. 926; P. C. 171, Sec. 177), a judgment fixing the amount of the award that is made to the owner of the property appropriated because of the appropriation, both for the property actually taken and for other property damaged thereby; and third (by Id. Sec. 927; P. C. 171, Sec. 178) " . . . a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes." '

"An appeal is granted by the statute only from the second of the judgments above referred to, namely, that awarding the damages. Rem. Code, Sec. 931; *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser, supra; North Coast R. Co. v. Gentry,* 58 Wash. 80, 107 Pac. 1059.

'The only method of reviewing the question of the right to take property under the power of eminent domain, that is, the question of use and necessity, is by certiorari or writ of review. *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.,* 29 Wash. 491, 69 Pac. 1107, 92 Am. St. 907; *What-*

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com County v. Yellowkanim, 48 Wash. 90, 92 Pac. 892; *State ex rel. Pagett v. Superior Court,* 46 Wash. 35, 89 Pac. 178; *State ex rel. Alexander v. Superior Court,* 42 Wash. 684, 85 Pac. 673; *State ex rel. Smith v. Superior Court,* 30 Wash. 219, 70 Pac. 484.

"The only method of reviewing the decree of appropriation, the last of the three judgments above mentioned, if at all, is by certiorari or review. *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser, supra; Olympia Light & Power Co. v. Tumwater Power & Water Co.,* 55 Wash. 392, 104 Pac. 778; *State ex rel. Davis v. Superior Court,* 82 Wash. 31, 143 Pac. 168. Even then we cannot again review the adjudication of necessity, nor review that question at all if it was allowed to become final without review thereof.

"We have held that, upon an error from a judgment awarding damages in a condemnation proceeding, no question can be raised as to the right to condemn, but that the review will be confined solely to the propriety and justness of the amount of damages. *Fruitland Irr. Co. v. Smith,* 54 Wash. 185, 102 Pac. 1031; *North Coast R. Co. v. Gentry, supra; Calispel Diking Dist. v. McLeish,* 63 Wash. 331, 115 Pac. 508; *Seattle, Port Angeles & Lake Crescent R. v. Land,* 81 Wash. 206, 142 Pac. 680; *State ex rel. Davis v. Superior Court, supra.*

"The only question, then, which relators may present to this court upon appeal from the second judgment is that of the adequacy of the damages

awarded, and, for this reason, they contend that, having no appeal from the last judgment, the decree of appropriation vesting the title in the appropriator, they have the right to a writ of review therefrom which would review the original order or judgment of necessity.

"We have uniformly held that the writ of review for the purpose of reviewing the judgment or order of necessity entered in an eminent domain case must be applied for within thirty days from the date of the entry of the judgment. *State ex rel. Lowary v. Superior Court,* 41 Wash. 450, 83 Pac. 726; *State ex rel. Alexander v. Superior Court,* 42 Wash. 684, 85 Pac. 673; *State ex rel. Tumwater Power & Water Co. v. Superior Court,* 56 Wash. 287, 105 Pac. 815.

"The judgment of necessity was entered herein October 15, 1914, and within thirty days thereafter these same relators petitioned this court for a writ of review to review the identical judgment of necessity which it now seeks to have the court again review. At that time this court fully reviewed every question involved in the present application, including the constitutional question, and upheld the judgment of the lower court and the constitutionality of the private way of necessity statute. To issue a writ now would reverse all previous decisions of this court and establish a precedent which would require this court to issue the writ in all subsequent condemnation cases after the decree of appropriation had been made, and again review the judgment of necessity. Without the adjudication and judgment of

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necessity, no subsequent proceedings can be had. As to that, under our system, it is final, subject only to review as provided by law.

"*It seems to us that the supreme court of the United States overlooked our decisions holding that the judgment or order of necessity, under our statutes, is a final judgment.* And it has always been held by that court that constructions of local statutes and of judicial procedure by the court of last resort of a state will be followed by that court. The decree of appropriation is nothing more than a collective judgment, incorporating in it the decree or order of necessity and judgment on the award of the jury. The decree of appropriation vests title in an appropriator upon the condition that the appropriator pays to the owner, or into court for his benefit, the money awarded, and there is nothing to bind or compel the appropriator so to do. He can then waive his right to appropriate and take the land, abandon it, and refuse to pay the money, in which case the owner of the land would retain his land, and the previous judgments and orders would be null.

"For these reasons, the writ of review and stay of proceedings are denied." (Italics ours.)

Here the condemnee had vainly tried to get back into the Supreme Court of Washington to raise the federal question of the constitutionality of the taking, only to be told that the question had been decided before and that the Supreme Court of the United States

had overlooked the decision of the Supreme Court of Washington holding the judgment on the order of public use and necessity was final.

The Supreme Court of Washington has again recently examined condemnation procedure under the laws of the State of Washington in *State ex rel. Northwestern Electric Co. v. Superior Court of Clarke County*, 27 Wash. (2d) 694, 179 Pac. (2d) 510. In this case the Court again holds that in Washington there are three separate and distinct judgments, each of which, subject to proper review by the Supreme Court, is a final judgment. The first is the judgment of public use and necessity in which certiorari will lie as a matter of right since it is a final judgment and not appealable; the second is the judgment of award in which an appeal will lie, but only to correct errors in determining the amount of the award; and third, the decree of appropriation, which is not appealable and certiorari will lie only to correct technical errors in the decree itself. Under the Washington law, therefore, the only time a final decision of the Supreme Court of Washington could be obtained on questions of the legality or constitutionality of the taking would be on the judgment on public use and necessity. In no later proceeding will any federal question be presented or passed on by the Court that would give an opportunity for an appeal to the Supreme Court of the United States.

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The public policy of the State of Washington is clearly to have all legal questions as to the taking of property by eminent domain settled prior to the paying of the compensation. When compensation is paid, title is good in the condemnor and he may take or damage the property with perfect assurance that there is no further liability to the condemnee. The holding in the Grays Harbor case in this Court runs counter to this policy. As well illustrated in this case, such a holding raises some extremely serious and complicated questions. Here the condemnee is a public utility company serving thousands of customers. One of its principal generating plants is sought to be condemned involving, by the condemnor's own estimates, values in excess of $10,000,000. The condemnation award, whatever it may be, is to be raised by the sale of bonds to the public. When the decree of appropriation is entered and the money is paid into Court, the litigation ends, but at that time also the Supreme Court of Washington will refuse to entertain certiorari or stay the proceedings. (*State ex rel. Grays Harbor Logging Co. v. Sup'r. Ct.*, 100 Wash. 485, 171 Pac. 238.) The bonds will have been sold and distributed to the public, possibly non-callable for several years or at high premiums. The property will be taken, the service disrupted, the employees discharged and then, for the first time, does the condemnee have the opportunity for this Court to pass upon the legality of the taking. If the Court should hold the taking

illegal, it would still be impossible to restore all the affected parties to this present position and many would suffer irreparable damage.

We respectfully urge, therefore, that the holding of this Court in *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U. S. 251, 61 L. Ed. 702, 37 Sup. Ct. 295 be reexamined in the light of the subsequent holdings of the Washington Supreme Court, and that the rule laid down in *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 91 L. Ed. 80, to the effect

> "That question (the finality of the judgment) will be resolved not only by an examination of the entire record but, where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice. *Brady v. Terminal R. Asso.* 302 U. S. 678, 688, 82 L. ed. 523, 531, 58 S. Ct. 134, 24; *Brady v. Southern R. Co.*, 319 U. S. 777, 87 L. ed. 1723, 63 S. Ct. 1028. See Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1005."

We are not unmindful of *Catlin, et al v. United States*, 324 U. S. 229, 65 Sup. Ct. 631, 89 L. Ed. 911, but this case deals not with condemnations generally under state procedures, but with the specific rights to appeal to the federal courts on condemnation proceedings brought by the United States. Congress saw fit to

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provide the United States with the right to take immediate title and possession of condemned property as a matter of public policy and to provide that the legality of taking could be raised only on appeal at the conclusion of the entire case. Congress has undoubted power to do so and its judgment as to what is the best public policy is conclusive. It may well be that in condemnations by the United States it is more important that the United States be able to take immediate title and possession and that the question of the legality of the taking be deferred until the termination of the case, than that the condemnee should have the right to hold up the taking and possession until the question of its legality has been determined. But the public policy of the State of Washington does not so provide in condemnation by private parties or municipal corporations, and that policy should be recognized and followed by this Court.

While not a condemnation suit, we think the recent case of *LaCrosse Telegraph Co. v. Wisconsin Employment Relations Board*, 336 U. S. 18, 93 L. Ed. 265, is in point. In this case the Court, speaking through Mr. Justice Douglas, held that a determination by the Wisconsin Supreme Court upholding a certification by the Wisconsin Employment Relations Board was a final judgment, although it of itself did not command any action but was enforcible in law only by another proceeding. The Court said:

"We assumed in *Allegheny Ludlum Steel Corp. v. Kelley,* 330 U. S., 767, 91 L. Ed. 1234, 67 S. Ct. 1026, that the certification of a collective bargaining representative, sustained by the highest court of the state, was a final judgment, although it did not of itself command action but like the certification here was enforcible in law only by another proceeding.

"We think that is the correct view. The fact that Wisconsin's certification was not in the form of a command is immaterial. See *American Federation of Labor v. National Labor Relations Bd.,* 308 U. S. 401, 408, 84 L. Ed. 347, 351, 60 S. Ct. 300. It was not an abstract determination of status. Nor was it merely an interim adjudication in an uncompleted administrative process. It established legal rights and relationships. It told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions. The character of the certification was therefore such as to make it reviewable under the appropriate standards for exercise of the federal judicial power."

So here the judgment is not merely an interim adjudication. It establishes finally the legal rights and relationships between the parties and determines definitely the right of the appellee to take appellants' property subject only to paying the compensation to be fixed.

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2. THERE IS A SUBSTANTIAL FEDERAL QUESTION INVOLVED

We do not believe this is the place to discuss the case on its merits, but that it is sufficient to point out the substantial nature of the questions raised. The opinion of the Supreme Court of Washington in *State ex rel. The Washington Water Power Company v. Superior Court of Chelan County,* 134 Wash. Dec. 179, clearly sets up the federal questions involved. The case was presented to the Court en banc and the opinion, (copy of which is attached to the jurisdictional statement) was by a divided Court seven to two, two Justices dissenting upon the ground that the state statutes involved were repugnant to the federal constitution and laws, so there is an indication that at least some of the Justices of the Supreme Court thought the question substantial.

The question briefly stated is: Can a local municipal corporation which is unregulated by any state authority acquire a hydroelectric property which has been built under a federal license on either government land or using the navigable waters which belong to the Nation as a whole free from regulation by the Federal Power Commission representing the Nation as a whole and commit itself by binding agreements with its bond holders to fix and maintain rates which may be so unreasonably high as to deprive the con-

sumers of the benefits to which they are entitled, Vol. 41, United States Statutes at Large, Sec. 19, p. 1073, Sec. 812, Title 16 U. S. C. A. of the Federal Power Act provides:

> "As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other

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authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter. June 10, 1920, c. 285, Sec. 19, 41 Stat. 1073."

The first sentence provides that licensees that are public service corporations shall abide by state regulation. This was intended to remove any question that a public service corporation which was a federal licensee thereby became an instrumentality of the federal government and immune to state regulation. It was, of course, not necessary to include in this category licensees which were municipal corporations, as a municipal corporation would not be in any sense considered as an instrumentality of the federal government. The next sentence, however, provides "That in case of the development, transmission or distribution, or use in public service of power by *any licensee under this chapter* * * * within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee * * * or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, * * * ." (Italics ours.) Here

it is to be noted that the restriction is not limited to licensees that are public service corporations, but it includes all licensees. This is sound public policy. If a small municipality, wholly unregulated, is free to appropriate power sites on our great navigable rivers and use them exclusively for its own local benefit, such use would be inconsistent with the broad purposes of the Act to provide for the beneficial and economic development of the water resources of the Nation for the benefit of the people as a whole.

The further question was raised as to the right of an assignee to take over a license on different terms than those contained in the original license. The Supreme Court of Washington, in passing on this question said:

> "We are not unmindful of Sect. 801 of the Act which provides:
>
> > ' . . . any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: . . . '
>
> "We feel that the above section would bind the

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district as to provisions such as a limitation on the amount of water to be appropriated, etc., but that it would not give the commission the power to regulate rates of a municipality. It would bind the assignee only as to those provisions to which it could have been subjected had the assignee been the original licensee, and if such a licensee is a municipality, the commission has no authority to regulate its rates."

The law makes no such distinction as the Supreme Court of Washington reads into it, and the interpretation of this section is important and substantial, and should be definitely determined by this Court.

The Supreme Court of Washington held squarely that the appellee was not subject to state regulation, but that it was also not subject to regulation by the Federal Power Commission. It also held squarely that the binding agreement made between the Public Utility District and its bond holders to fix and maintain rates was not violative of Section 803 (h), Title 16 U. S. C. A., 45 United States Statutes at Large, Sec. 206, page 842. When more and more of the federal power sites fall into municipal hands, it becomes of increasing importance to determine whether the municipal licensees are empowered to operate their plants free of regulation by both state and federal regulatory bodies. This question is not only substantial, but is one that is demanding of an early determination and is squarely presented to this Court in this case.

We respectfully request, therefore, that the motion to dismiss be denied and that in any event the question of jurisdiction be deferred until the argument of the case on its merits.

Respectfully submitted,

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